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LIMITS TO EU LOYALTY

BY

Timothy ROES*

In 2011, a few months after the judgment in *Commission v. Sweden*, (1) an article in the *European Law Review* wondered whether Member States' duty of loyalty in external relations was indeed as limitless as the judgment seemed to say it was. (2) Anyone vaguely familiar with the principle is bound to have similar concerns with regard to the principle's application outside the area of external relations. A striking number of the Court's landmark judgments — from *Costa v. ENEL*, over *Factortame* and *Francovich* to *Courage v. Crehan* — have loyalty as their only or principal foundation.

Surprisingly, studies tracing the boundaries of Article 4(3) are few and far between. Scholarly scrutiny of the Court's activism has rarely extended to the Court's reliance on what is now Article 4(3) TEU. In 2008, however, John Temple Lang produced a helpful list of general restrictions emerging from the case law. Kirstin Reuter's 2013 doctoral dissertation (hitherto unpublished) has examined what limits conferral poses to Member States' loyalty duty in external relations. (3)

Hoping to make loyalty less of a thought-terminating cliché in legal argumentation, this paper revisits the case law and the changes brought by the Lisbon Treaty and argues that loyalty is far from limitless. It makes a four-fold argument.

First, it examines what constraints flow from the text of Article 4(3) and from its place in the TEU. The paper submits that the provision gives the Court a broad mandate to determine what duties flow, for the Member States, from the objectives of the Treaties, but that it leaves the Court less freedom when this would result in positive obligations, rather than mere “negative” duties of abstention. Moreover, its placing by the Lisbon Treaty highlights that, more than ever before, it ought to be construed with respect for the Member States' national identity as well as in keeping with the principles of conferral, proportionality and subsidiarity.

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(1) Judgment in *Commission v. Sweden* (“PFOS”), C-246/07, EU:C:2010:203.

(2) A. DELGADO CASTELEIRO and J. LARIK, *The duty to remain silent: limitless loyalty in EU external relations?*, 2011, 36 ELR 524.

(3) K. REUTER, *Competence Creep via the Duty of Loyalty?: Article 4(3) TEU and its Changing Role in EU External Relations* (unpublished PhD thesis, European University Institute, 2013).

Second, the paper looks at the ways in which the Court has “tied itself to the mast” in its application of the loyalty principle. The Court has generally stuck to the text of Article 4(3) (or its predecessors), rather than to rely on the unwritten general principle of which the Treaty provision is merely the expression. The Court moreover has shown deference to the political branches by repeatedly making clear that Article 4(3) is of a residual nature, which means that loyalty only becomes relevant when there are no other, more specific rules governing the situation at hand. (4) Even then, loyalty cannot create wholly new obligations, according to the Court. For instance, while Article 4(3) TEU precludes Member States from facilitating anti-competitive behaviour prohibited by Articles 101-102 TFEU, the Court takes pains to stress that the latter provisions only apply to undertakings, not Member States. (5) Finally, the Court has held that the principle is inherently mutual, which means that it also imposes obligations on the Union institutions, not only towards the Member States but towards one another as well. (6)

Third, the paper argues that other general principles of Union law have informed and constrained the Court’s use of Article 4(3). In particular, it explores (i) how the principles of conferral, proportionality, subsidiarity and legal certainty have attenuated full-throttle effectiveness, and (ii) how fundamental rights have created an exception to the loyalty-based obligation of mutual trust between the Member States.

That conferral ought to soften loyalty’s bite appears for instance in the line of case law on the limits to national procedural autonomy, starting with *Rewe-Zentralfinanz* and *Comet*. (7) While Article 4(3) requires national courts to ensure the effective judicial protection of the rights that individuals derive from Union law, loyalty can only require so much from national courts before it impinges on a competence that belongs to the Member States — something which the Court repeats to this day. Thus, all loyalty requires is that the judicial protection of EU rights is equivalent to that of national rights and that national procedural law does not make it ‘virtually impossible or excessively difficult’ to enforce them — a standard that does not entail full effectiveness.

(4) Judgment in *Compagnie Commerciale de l’Ouest*, C-78 to 83/90, EU:C:1992:118, para. 19.

(5) Judgments in *GB-Inno-BM*, 13/77, EU:C:1977:185; *Asjes and Others*, 209 to 213/84, EU:C:1986:188.

(6) Judgment in *Luxembourg v. European Parliament*, 230/81, EU:C:1983:32, para. 37.

(7) Judgments in *Rewe-Zentralfinanz*, 33/76, EU:C:1976:188; *Comet*, 45/76, EU:C:1976:191.

The principle of proportionality, too, puts limits on effectiveness. For instance, following *Commission v. Greece*, Article 4(3) requires Member States to adopt sanctions to enforce EU law when secondary EU law does not itself provide for them. These sanctions, however, not only need to be effective and dissuasive but must also be proportionate. (8)

The principle of subsidiarity appears less relevant to the limitation of loyalty in the Union's internal affairs. Externally, however, the Court does sometimes question the necessity of an *ERTA*- (and thus loyalty-) based external action. (9) Some authors have called this an expression of subsidiarity. (10)

The principle of legal certainty, too, creates an important limit to loyalty. For instance, in *Kühne & Heitz* the Court was quick to point out that Article 4(3) does not go so far as to require any administrative body to review administrative decisions that have become final but, in light of later case law of the Court, seem to violate EU law. (11) Expressing concern for legal certainty, the Court thus established four cumulative conditions that must be met before such a duty arises. Another example is *Winner Wetten*, in which the Court left open the possibility that "overriding considerations of legal certainty involving all the interests, public as well as private" could justify temporarily maintaining a national measure violating Union law in order to prevent a legal vacuum. (12)

Fundamental rights form an integral part of the general principles of Union law and, they too, have occasionally limited loyalty. Article 4(3) TEU is the basis for the obligation of mutual trust between the Member States, which is central not only to the internal market but also to the EU asylum system (the Dublin Regulation). In *N.S.*, (13) however, the Court provided for an exception to the duty of mutual trust in light of the ECHR and the earlier judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*. (14) Thus, where a Member State "cannot be unaware

(8) Judgment in *Commission v. Greece*, 68/88, EU:C:1989:339, para. 24.

(9) See in particular the Judgments in the *Open Skies* cases (e.g. *Commission v. United Kingdom*, C-466/98, EU:C:2002:624).

(10) C. HILLION, "ERTA, ECHR and *Open Skies* : Laying the Grounds of the EU System of External Relations", in M. POIARES MADURO and L. AZOULAI (eds), *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), 224, at 228.

(11) Judgment in *Kühne & Heitz*, C-453/00, EU:C:2004:17.

(12) Judgment in *Winner Wetten*, C-409/06, EU:C:2010:503, para. 66.

(13) CJEU, joined cases C-411/10 and C-493/10 *N.S. and M.E.*, EU:C:2011:865.

(14) ECtHR, *M.S.S. v. Belgium and Greece* (Application no. 30696/09).

that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible”, (15) it may not transfer an asylum seeker to that Member State.

Fourth, the paper considers new limits to loyalty. With the exception of conferral, the principles described above primarily constrain loyalty where it threatens to affect individuals. As such, they do not provide effective boundaries to loyalty in the area of external relations. The paper examines to what extent additional limits can be found in (i) Article 4(2) TEU (respect for national and constitutional identity and, more generally, considerations of federalism), as well as in (ii) concerns of democratic accountability. As to (i) it is submitted that Article 4(2) is unlikely to lead to a sea change since the Court has consistently employed loyalty in the interest of the uniformity of EU law. However, Article 4(2) might provide the Court with a textual basis to make some of its implicit federalism-considerations more explicit, for instance with regard to the mutual recognition of same-sex marriages. With regard to (ii) it is pointed out that, especially in external relations, loyalty leads to a *de facto* transfer of power from the Member States to the Union (competence creep), which arguably should go hand in hand with a transfer of democratic accountability. The paper examines whether the involvement of the Council and the European Parliament provides sufficient guarantees in this respect.

(15) *N.S. and M.E.*, para. 94.